
(1984) 12 BOM CK 0005
In the Bombay High Court
Case No : Writ Petition No. 245 of 1981

Eastern Agencies and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 03-12-1984

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 10, 9

Citation : (1985) 6 ECC 50

Hon'ble Judges : S.P. Bharucha, J

Bench : Single Bench

Judgement

Bharucha, J.—This petition seeks to quash an order passed by the Foreign Exchange Regulation Appellate Board. The decision of the petition depends upon the interpretation placed on the phrase "own or holds" in s. 9 of the Foreign Exchange Regulation Act, 1947. Section 23EE thereof provides that an appeal shall lie to the High Court only on questions of law from any decision or order of the Appellate Board. This is a matter in which an appeal ought to have been filed. I am, however, unable to uphold the preliminary objection upon this ground because the petition has been entertained and heard and there is some doubt as to whether the appeal would now be entertained : *L. Hirday Narain Vs. Income Tax Officer, Bareilly*,

2. The first petitioners carry on business as indenting agents of foreign manufacturers of drugs and chemicals. They place orders with foreign manufacturers for the supply of drugs and chemicals to Indian purchasers. The first petitioners are paid commission by the foreign manufacturers. The rate of commission varies and differs from foreign manufacturer to foreign manufacturer. After the drugs and chemicals have been despatched by the foreign manufacturers, invoices are sent to the Indian purchasers. The foreign manufacturers, make credit entries in their books of account of the amount of the commission payable to the first petitioners in respect of the transactions and issue credit notes to them. It is the petitioners' case that, thereafter, the foreign

manufacturers may issue statements relating to the credit notes sent mentioning the amounts repatriated to the petitioners. It is their case that if there is a dispute between a foreign manufacturer and an Indian purchaser and the Indian purchaser does not make payments as invoiced, the foreign manufacturer is entitled to deduct the balance due to him from the commission payable to the first petitioners or to decline to pay the commission at all, in which case it is not possible for the first petitioners to dispute such deductions or refusal. It is their case that in relation to transactions which had taken place in past years, it is not possible for them to correlate particular credit notes against receipts of foreign exchange.

3. On November 26, 1968, a raid was carried out on the premises of the first petitioners by officers of the Enforcement Directorate and files and documents were seized. On July 28, 1975, four show-cause notices were issued to the first petitioners and their partners (including the second petitioner) alleging that they had contravened ss. 9, 10 and 5 of the FERA. On November 4, 1976, the petitioners filed a reply setting out their case as aforesaid. On November 30, 1976, the Additional Director of Enforcement found the petitioners guilty of the charges and imposed upon the first petitioner a penalty in the aggregate sum of Rs. 51,500 and a penalty of Rs. 4,200 on each of the partners. The petitioners preferred an appeal to the Appellate Board on January 17, 1977. On November 29, 1980, the penalty levied upon the petitioners was confirmed by the impugned order.

4. The challenge in the petition has been limited by Mr. Hidayatullah, learned counsel for the petitioners, to the penalty of Rs. 50,000 upon the first petitioner and of Rs. 4,000 upon the second petitioner in respect of the charge under s. 9.

5. Put shortly, the charge under s. 9 is that the petitioners owned and held foreign exchange earned towards commission from various foreign manufacturers but failed to surrender the same to an authorised dealer in foreign exchange within the specified time and thereby contravened s. 9. The Appellate Board analysed the evidence available in respect of the various commission amounts and concluded that there was not sufficient evidence to show that all the amounts had not been offered for sale within the prescribed period. The Appellate Board noticed the argument advanced on behalf of the petitioners that, for the purposes of s. 9, the receipt of credit notes by the petitioners from the foreign manufacturers could not be equated with the owning or holding of the foreign exchange mentioned in the credit notes. The Appellate Board was unable to agree. It held that the crediting of the accounts of the petitioners with the amounts of the commission earned was already accomplished when the credit notes were issued. The act of placing the amounts at the disposal of the petitioners was fully completed and executed and the amounts stood transferred to the petitioners as soon as the credit notes were issued by the foreign manufacturers. Nothing remained to be done by the petitioners to complete the act of crediting and thereby transferring the amounts to the petitioners. The

petitioners had, therefore, full dominion and control over the commission amounts credited in the petitioners' accounts with the foreign manufacturers. As such, the petitioners could be said to have owned and held the amounts of commission credited in their accounts from the dates of the credit notes or, at the latest, from the dates upon which the petitioners received the credit notes proved that the petitioners had the right to receive the commission amounts mentioned therein and, as there was an inordinate delay on the part of the petitioners in receiving the commission amounts, it was possible that the petitioners had committed contravention of s. 10(1).

6. The interpretation of the phrase "owns or holds" in s. 9 would appear to be *res integra*. The phrase must be interpreted in the context of the fact that it refers to moneys in foreign currencies and s. 9 requires the tender thereof for sale to the Reserve Bank. The phrase must also be interpreted in the light of s. 10 which sets out the duty of a person who has "a right to receive" foreign exchange. A person who "owns" foreign exchange for the purpose of s. 9 must, therefore, be one who has title to and control over the moneys in foreign currencies so as to be able to offer or cause them to be offered for sale to the Reserve Bank. And a person who "holds" foreign exchange for the purposes of s. 9 must, therefore, be one who has control over the money in foreign currency so as to be able to offer or cause them to be offered for sale to the Reserve Bank.

7. A credit note has been defined in Jowitt's Dictionary of English Law, 2nd edn., p. 510, to be a note issued by a trader setting out that the person to whom it is directed is entitled to be credited by the issuer with a certain amount. I will go further and proceed upon the basis that the credit notes were issued by the foreign manufacturers to the petitioners after the foreign manufacturers had credited the accounts of the petitioners in their books with the amounts stated in the credit notes.

8. The petitioners did not have title to or control over the money in foreign exchange mentioned in the credit notes. Upon receipt of the credit notes, the petitioners were only made aware that the issuers thereof had placed in their books of account the amounts mentioned in the credit notes to the credit of the petitioners. The petitioners had no more than the right to receive the moneys in foreign currencies stated in the credit notes.

9. In my view, therefore, s. 9 had no application to the case and the Appellate Board's order in so far as it upholds the charge under s. 9, the penalty of Rs. 50,000 imposed upon the first petitioners and of Rs. 4,000 imposed upon the second petitioner cannot stand.

10. It is not now necessary to go into the alternate argument advanced by Mr. Hidayatullah that the amounts mentioned in the credit notes were contingent debts because the foreign manufacturers were entitled to deduct from them in the event of the Indian buyers not paying the invoiced prices.

11. The order of the Appellate Board dated November 29, 1980, is quashed and

set aside to the extent that it upholds the contravention of the charge under s. 9, the penalty of Rs. 50,000 imposed upon the first petitioners, and of Rs. 4,000 upon the second petitioner.

12. There shall be no order as to costs.

13. Rule accordingly.

14. The respondents shall return to the petitioners such amount as has been deposited by them in excess of the penalty which is not challenged within a period of four weeks from today. The bank guarantee given by the petitioners pursuant to the interim order of this court shall stand discharged after a period of four weeks from today.